No. 9[illegible]3 [illegible]7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. _____.

GEORGE D. HORNING, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof.

HENRY E. DAVIS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. _____.

GEORGE D. HORNING, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

The petitioner states as follows:

1. On, to-wit, the 13th day of July, 1917, there was filed in the Police Court of the District of Columbia by respondent an information charging petitioner with violation of the Act of Congress of February 4, 1913 (37 Stat. at L. 657, chap. 26), entitled "An Act to Regulate the business of loaning money on security of any kind by persons, firms, and corporations other than National banks, licensed bankers, trust companies, savings banks, building and loan associations and real estate brokers in the District of Columbia," upon the filing of which, and before petitioner's arraignment thereon, the judge presiding, of his own motion, quashed the information, upon the ground that the facts therein set forth did not constitute a violation of the said Act of Congress. On writ of error from

the Court of Appeals of the District of Columbia to the Police Court the Court of Appeals reversed the action of the judge of the Police Court and remanded the cause thereto, with instructions to vacate the order quashing the information, and for further proceedings (*D. C.* vs. *Horning,* 47 App. D. C., 413).

2. Thereafter petitioner being arraigned pleaded not guilty and was tried by the Police Court and a jury, which latter returned a verdict of guilty, and petitioner was sentenced accordingly.

3. On the trial of petitioner by the Police Court the judge presiding, in effect, told the jury that he, the judge presiding, found the facts disclosed by the evidence to be such as the Court of Appeals in reversing the former action of the Police Court had held to constitute a violation of the said Act, concluding his instruction to the jury with what was admitted in substance and effect to be a peremptory instruction to the jury to find petitioner guilty, and an admonition, not to say adjuration, to the jurors that their failure so to find could arise only from a willful and flagrant disregard of their oaths.

4. On writ of error to the Police Court allowed petitioner to review the last mentioned action of that Court, the Court of Appeals affirmed the same, and the mandate of the Court of Appeals to the Police Court to carry into execution the sentence of petitioner is about to issue.

5. Petitioner files herewith as an exhibit a certified copy of the entire transcript of record of the case, including the proceedings in the Court of Appeals.

6. The instructions of the judge of the Police Court to the jury, as aforesaid, amount in both law and fact to a peremptory direction to find petitioner guilty as

charged, upon the ground that the judge himself found as a matter of fact that the matters alleged in the information as constituting the offence charged against petitioner were established by the testimony presented at the trial, and that for the jury to find otherwise would be in willful and flagrant disregard of their oaths, whereby petitioner was deprived of his Constitutional right to be tried by the jury, and not by the Court, in the premises, and the force and effect of such, the action of the said judge, was to coerce the jury to find petitioner guilty, and the jury so found; and the Court of Appeals in affirming the action of the said judge in the premises denied the petitioner his right to trial by jury, contrary to the Constitution of the United States and the law of the land.

To the end, therefore, that the action of the said Court of Appeals, as aforesaid, may be reviewed and determined by this honorable Court, the petitioner prays that the said Court of Appeals be required by certiorari to certify the said cause to this Court, according to the form of the statute in such case made and provided, and that in that behalf all necessary orders may be made and proceedings had.

Respectfully submitted,

GEORGE D. HORNING, Petitioner.

By Henry E. Davis,
His Attorney.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. ------.

GEORGE D. HORNING, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

Statement of the Case.

Petitioner, a pawnbroker, was charged by respondent in the Police Court of the District of Columbia with violation of the Act of Congress of February 4, 1913, namely, in engaging in the business of loaning money on security at a greater rate of interest than six per cent. per annum, without having procured a license so to do.

The information sets forth in great detail the acts charged to have been done by the petitioner as constituting a violation of the Act (Rec. 2-9). Of his own motion, the judge at the time presiding in the Police

Court quashed the information, upon the ground that as matter of law the facts set forth did not constitute a violation of the Act.

On writ of error procured by respondent, the Court of Appeals of the District of Columbia reversed the action of the Police Court and remanded the information for trial.

In its opinion (47 App. D. C., 413, 421), the Court of Appeals enumerated nine elements as involved in the business of a pawnbroker, as conducted by petitioner, of which it said that five were performed in his Washington office, and the remainder in his Virginia office. On the trial petitioner contended that the testimony showed that no one of the five elements enumerated by the Court of Appeals as performed in the District of Columbia was in fact there performed, and asked and requested five separate instructions to the jury, upon which, if granted, petitioner might have contended and the jury might have found accordingly (Rec. 37-8), necessitating a verdict of not guilty.

The trial Court refused each of the requested instructions, and of its own motion charged the jury that there was no contradiction in the testimony of the witnesses; that the only question for the jury to decide was whether it believed the witnesses; that if the jury believed the witnesses its verdict should be one of conviction, and that if it did not believe the witnesses the jury was at liberty to acquit, and should acquit petitioner; adding that if the jury believed the testimony of the witnesses it was its duty to bring in a verdict of guilty. To this charge of the Court exception was duly taken (Rec. 40).

At five o'clock in the afternoon of the day of the trial the jury retired and remained out all night. The

following morning, the jury being recalled to the Court room, the Court delivered a further charge, in which, after stating that the law makes the jury sole judges of the credibility of witnesses and the weight of the evidence, and where there is conflict between the evidence for the Government and evidence for the accused it is the jury's exclusive province to weigh the evidence and determine where the truth lies, added "but we have not a case of that kind here, in the case at bar there is no conflict in the evidence upon any material point," and closed by saying (Rec. 41):

> "In a criminal case the Court cannot peremptorily instruct the jury to find the defendant guilty. *If the law permitted I would do so in this case.*
>
> "In conclusion, I will say to you that a failure by you to bring in a verdict in this case can arise only from a wilful and flagrant disregard of the evidence and the law as I have given it to you, and *a violation of your obligation as jurors.*"

Upon due exception by petitioner to this as amounting to a peremptory instruction to the jury, the Court added:

> "Of course, gentlemen of the jury, I cannot tell you in so many words, to find the defendant guilty, *but what I say amounts to that.* The facts proven before you are in accord with the information. The Court of Appeals has said that that constitutes a violation of the law and *that is all there is in the case.*"

Upon petitioner's repeating his objection and exception to the language of the Court as an invasion of the province of the jury, the Court added further:

> "As I have told you, gentlemen, even if I am in error, it is your duty to accept the law as I have given it to you."

And thereupon petitioner excepted on the ground that the only effect of this could be coercion of the jury, and moved the Court to discharge the jury from further consideration of the case, which was refused, and exception taken (Rec. 41).

In its opinion the Court of Appeals, ignoring the instructions requested by petitioner and refused by the Police Court,—*which instructions were based upon evidence presented by petitioner for the express purpose of establishing that no detail of his business was transacted in the District of Columbia*—considered only the instructions given to the jury, after quoting from which the Court of Appeals said:

> "The trial justice *made it clear* that the jurors are the *sole* judges of fact; that he had no power to peremptorily instruct a verdict of guilty, and that, notwithstanding any opinion he might express, the *ultimate decision of guilt* or innocence *resided in the jury.*" (Rec. 51).

And the Court said further:

> "The jury, however, was not divested of the *freedom* to exercise arbitrary power. On the contrary it was *expressly* told it that it possessed that power." (Rec. 52).

It is deferentially but positively insisted that each portion of the opinion of the Court of Appeals thus quoted is without support by the Record; and it is with equal positiveness and confidence submitted that the

entire language of the trial judge will be read in vain to find anything remotely akin thereto. In a word, it is a perfectly fair summary of the instructions of the trial judge to say that they amount to no more than this: "Usually a jury has something to do in a case, but not this time."

Again in its opinion the Court of Appeals, speaking of the case of *Masters* vs. *United States,* 42 App. D. C., 350, one of its own decisions relied upon by petitioner, says:

> "We held in that case that error was committed in refusing to admit certain testimony, which, if admitted, would have presented a sharp issue of fact for the jury." (Rec. 57).

How far from the fact is this the most cursory reading of the case shows.

In that case the trial Court refused admission of certain testimony offered by defendants, but *upon the testimony admitted* instructed the jury in language which the Court of Appeals found to constitute reversible error, *wholly without reference to the testimony rejected*; and in reversing the trial Court the Court of Appeals used this explicit language:

> *"The Court stated that no issue of fact existed, and applying the law to the facts thus found by the Court to be established declared that the defendants were guilty and instructed the jury that it ought so to find."*

Language more appropriate to the instant case cannot well be conceived.

And it was not until *after having thus decided and effectually disposed of the case for the purpose of reversal,* that the Court of Appeals proceeded in its opinion to say that the trial court fell into error in interpreting the statute under which defendants were indicted to mean one thing, whereas it meant more, and that for this reason the rejected testimony should have been admitted; thereby finding another error *in addition to and independent of that for which the judgment below already stood reversed.*

How far this is from justifying the Court of Appeals in saying in the instant case that the *Masters* case was decided as it was *because* the rejected testimony, if admitted, "would have presented a sharp issue of fact" is surely too obvious for comment.

It is a fair and respectful paraphrase in abstract of the opinion of the Court of Appeals under consideration to say that it amounts to this:

A trial judge may tell the jury that it should, and if not recreant to its oath would, find a defendant guilty, and that while it has the power, it has not the right, to find him not guilty, and this is not error, provided that a verdict of not guilty ought not to be rendered on the evidence as viewed by the Court.

Says the Court of Appeals, speaking of the jury:

> "They had the arbitrary power, but not the *right,* to return a verdict of not guilty. * * * There was no *lawful* power vested in the jury to acquit defendant. In convicting him, no right of his was violated, since *he had no right to acquittal.* The right of trial by jury guaranteed by the Constitution is the right to a *lawful* trial when the jury is governed in its deliberations by the law as given by the Court."

(Rec. pp 51 & 52)

Comment upon this is sufficiently made by the Court of Appeals itself in its previous language in the *Masters* case, as follows (47 App. D. C., 353-4):

> "Of course, it is beyond the power of a court to instruct a jury to return a verdict of guilty in a criminal case, *either directly or indirectly by the use of language which amounts to the direction of a verdict.* * * * It would be a judicial frittering away of the citizens' Constitutional rights to hold that the charge of the court in this case did not amount to a direction to return a verdict of guilty. * * * *Indeed, the instruction was so explicit that the jury would have been justified in regarding it as a direct violation of the mandate of the court had it not returned a verdict of not guilty.*"

Again says the Court of Appeals in its opinion in the instant case:

> "Here, it is *conceded* there is no issue of fact, and the present decision, it must be remembered, rests solely upon that unique position." (Rec. p. 51)

To the contrary of this, the five instructions requested by the petitioner and refused by the trial Court, above mentioned, were upon the distinct ground that in order to a verdict of guilty the jury must find the five elements of petitioner's business, or at least one of them, said by the Court of Appeals in its first opinion in the case to have been performed by him in the District of Columbia, in fact to have been there performed, and that the testimony showed that in fact no one of them was there performed. It is obvious that if the trial Court took the same view of the testimony as was contended for by petitioner, the fifth request (being

for a directed verdict of acquittal) should have been granted; and that had the first four of the instructions been granted and the jury had found the facts in accordance with petitioner's contention, there must have been a verdict of acquittal. But the immediate point is that the rejected instructions presented petitioner to the jury as claiming, as fairly he might, that the testimony not only failed to show the performance by him in the District of Columbia of any one of the details of his business under consideration, but also fairly and convincingly showed the contrary. A more direct contention creating an issue of fact for consideration by the jury, or one more distant from concession to the contrary, it is impossible to conceive.

To resume the whole matter:

It was not conceded, nor does the record show, that there was no issue of fact in the case. On the contrary, the evidence offered by petitioner had for its distinct object the establishment of the fact that no one of the five details of his business previously declared by the Court of Appeals, *upon consideration of the information only*, to have been performed in the District of Columbia was in fact there performed; and this raised, however slightly, distinct and separate issues of fact for the jury's determination, issues which the Court could not withdraw from that determination; and the trial Court refused specific requests of petitioner for instruction to the jury bearing upon the issues of fact thus presented, which action of the trial Court the Court of Appeals passed without notice.

As above stated, the Court of Appeals affirmed the trial Court upon the single clear-cut proposition that **a trial judge may tell the jury that it should, and if not**

recreant to its oath would, find a defendant guilty and that while it has the power, it has not the right, to find him not guilty, and this is not error, provided that a verdict of not guilty ought not to be rendered on the evidence as viewed by the Court.

How this differs in fact from a specific direction by a court of a verdict of guilty in a criminal case, or in principle from assertion of the right of a court to set aside a verdict of not guilty in such a case, if in the opinion of the court such verdict should not have been rendered, counsel is unable to discern.

And the opinion and decision under consideration being by the Court of last resort in ordinary in the District of Columbia, a concededly Federal Court, and one sitting under the shadow of the building in which sits the highest tribunal of the land, the certainty of citation and the high probability of application of the opinion and decision in question by the other Federal tribunals of the land would seem obviously to require the granting of the petition herein, as presenting a question not only of the widest and most general Federal interest, but also of the Constitutional right of every citizen, highest and lowest alike.

Respectfully submitted,

HENRY E. DAVIS,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 9[redacted]3[redacted]77

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CONRAD H. SYME,
P. H. MARSHALL,
Attorneys for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No.

GEORGE D. HORNING, PETITIONER,

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

George D. Horning was convicted in the police court of the District of Columbia of a misdemeanor, for engaging, in said District, in the business of loaning money on security upon a rate of interest greater than 6 per cent per annum, in violation of the Act of February 4, 1913 (37 Stat. L., 657), and was sentenced to pay a fine of $50.

The record discloses that an information was filed against Horning, charging this offense in great detail, which information was quashed by the judge of the police court, upon

the ground that, as matter of law, the facts therein set forth did not constitute an offense under the Act aforesaid.

On writ of error allowed to the District of Columbia, the Court of Appeals examined the information, held that the facts charged therein did not constitute a violation of said Act of Congress, and remanded the case to the police court for further proceedings.

Thereafter the case came on for trial, and defendant therein demanded a trial by jury, and from a verdict of guilty and judgment thereon was allowed a writ of error to the Court of Appeals, which affirmed the judgment and sentence aforesaid. He now petitions this Honorable Court for the writ of certiorari to the Court of Appeals of the District of Columbia to review its action upon the second writ of error.

ARGUMENT.

Counsel for petitioner complains:

1. That the verdict of the jury in the police court was coerced.

2. That error was committed in refusing certain instructions prayed on behalf of defendant in the police court, which, if granted, would have presented issues of fact.

Concerning the first error alleged, the opinion of the Court of Appeals disposes thereof, adversely to the contentions of petitioner, in such a thorough and convincing manner that it would be presumptuous on the part of counsel for the District of Columbia to attempt any addition to or improvement upon the argument contained in the opinion itself. The opinion makes it perfectly clear that petitioner complains to this court, not that he did not receive a *fair* trial by an *impartial* jury in the police court, but because he did not receive an *unfair* trial, by a *partial* jury, acquitting him of an offense the commission of which he admitted when testifying as a witness in his own behalf.

Petitioner possesses the unique distinction of having entered a formal plea of not guilty of the offense charged against him, demanded a jury trial, and then taken the witness stand and testified to the commission by him of every act charged against him in the information, and determined by the Court of Appeals to constitute, as matter of law, the offense charged. A parallel case would be for a defendant, charged with assault with a dangerous weapon, to plead not guilty, and then testify that he deliberately shot at the prosecuting witness, with a revolver, without any provocation or extenuating circumstances; and, nevertheless, ask a verdict of acquittal and then complain if the jurors performed their plain duty, and brought in a verdict of guilty.

An examination of the record in this case, and particularly of the testimony of petitioner himself, and of the witnesses called on his behalf, removes every possibility of doubt as to his guilt, and demonstrates beyond question that he is not complaining of a miscarriage of justice, but because one did not take place for his benefit.

The Court of Appeals said, "Defendant, by his testimony, admitted the facts as completely as he could have done by a plea of guilty," and then pertinently inquires, "How far may a defendant rely upon the exercise of arbitrary power by a jury and complain if the jury disappoints his expectations?"

As to the second contention advanced by petitioner, that the refusal of his instructions deprived him of the benefit of issues of fact which would have been presented to the jury by such instructions.

The Court of Appeals had considered all of the facts involved in the charge against petitioner, which were set out in detail in the information reviewed by that Court upon the first writ of error, and which were identically the same facts proved before the jury, and admitted by petitioner.

What he really sought by the instructions requested, was to have the jury reach a different conclusion as to his guilt from that which the Court of Appeals had declared would

follow the proof of the facts alleged in the information, and, in effect, to have the jury review and overrule the Court of Appeals upon matters of law.

He now complains because, although he testified to the commission of every act which the Court of Appeals declared to constitute the offense with which he was charged, the jury was not permitted to consider whether these acts did constitute a violation of the law, in spite of the opinion of the Court of Appeals that they did.

The statement of such a proposition contains its own refutation.

We confidently submit that no cause has been shown sufficient to require the issuance of the writ of certiorari in this case.

Respectfully submitted,

CONRAD H. SYME,
P. H. MARSHALL,
Attorneys for Respondent.